US4C1977-1188-05

AMICUS BRIEF

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No 77-1148

ELTRA CORPORATION

Appellant

-against-

BARBARA A RINGER,

Appellee

BRIEF AMICUS CURIAE OF
INTERNATIONAL TYPOGRAPHIC COMPOSITION
ASSOCIATION AND ADVERTISING TYPOGRAPHERS
ASSOCIATION OF AMERICA, INC.

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PRELIMINARY STATEMENT

The Action and the Parties

This is a test case brought by a large manufacturer of typesetting equipment Eltra Corporation against the Register of Copyrights Eltra seeks to make new law by obtaining copyright protection for the shape of an alphabet and other typographic symbols placed on devices used in conjunction with Eltra equipment These shapes are not usually noticed by ordinary readers

The action is in the nature of mandamus and seeks to compel the Register to recognize such copyright by grant of

Elcra ... application for registration ... Amici, ... are ... associations of small typographers who buy both equipment and typefaces from Elcra. They use these products to generate pages of composed type for the printer.

Amici are opposed to a campaign to remove alphabets and related forms from the public domain through copyright

The Decision Below

Elcra moved for summary judgment for the relief demanded in the complaint and the Register cross-moved for dismissal of the complaint. Relying on the agreement of the parties that there was no genuine issue of any material fact, the United States District Court for the Eastern District of Virginia granted the Register's motion and dismissed the complaint. Amici respectfully submit that the Register was entitled to summary judgment only because the shapes of the alphabet and other symbols designed for Elcra are not copyrightable subject matter under the copyright statute. The decision below should accordingly be affirmed.

Interest of Amici

The interest of amici is set forth in more detail in the joint affidavit of Walter Bach and Thaddeus Wallace submitted in support of amici's motion to file this brief. This

interest to engage in the future which would suffer [illegible] eight [illegible] type face designs [illegible] set forth in the joint affidavit. This [illegible] from [illegible] of the following peculiar characteristics of the typographic industry.

[illegible] There are a handful of manufacturers of type setting equipment.

2. These manufacturers have long been the main sources of metal, glass or plastic devices called "fonts," "grids" or film containing alphabets and other symbols used in conjunction with their respective equipment to produce composed text for printing.

[illegible] These devices are not compatible or interchangeable as between different equipment.

4. Demand for newly-named designs of alphabets are promoted by equipment manufacturers and cooperating marketers to produce an artificial demand by [illegible] customers (e.g. advertising agencies, publishers, etc.). As a result, [illegible] are required to purchase unnecessary duplicates of existing designs and sometimes even additional typesetting equipment.

5. These designs do not generally differ from public domain designs in any respect significant to the ultimate consumer who neither notices nor effectively cares about differences in typeface designs.

QUESTION PRESENTED

[illegible] the shape of an alphabet stored on devices pro-
viding the means for composing and printing pages [illegible] a copy of
art or other copyrightable work under the copyright statute

ARGUMENT

I The Copyright Act [illegible]
[illegible] in this case

The Court is being asked to participate in the making
of new law after the Register of Copyrights and Congress have
declined to do so Indeed it is submitted that the express
refusal of Congress to protect typefaces several months ago
makes the problem raised in the present case moot after January
1, 1978 In the passage of a comprehensive copyright revision
bill (P L 94-553) Congress signed by the President on
October 19 1976 Congress specifically exempted typefaces
[illegible] to present typefaces designs under the new law (sec 113 d
Sup Ct 1976 Pocket Supp 24 [illegible]) Therefore "Congress in
part [illegible] Section 113 of the new law covers the general subject

[illegible]

[illegible]

[illegible]

[illegible]

copyrightable [illegible] graphic or [illegible] and with [illegible] the meaning of this bill" (55).

The thrust of [illegible] Congressional intent in this area has been to clarify rather than to contract the protection available under the 1909 law (see House Report 94-), Understandably Congress has remained of the view that typeface design is not presently copyrightable Moreover, in a number of circuit courts have for some time been relying on developments in the revision effort as an aid in interpreting the 1909 law (see e g Copyright v United Artists Television Inc 452 F 2d 560 (2d Cir 1971) Williams & Wilkins Co v U S 487 F 2d 1345 (Ct Cl 1973) aff'd by an equally divided Court 420 U S 376 (1975) Rohauer v Killiam Shows Inc 551 F 2d 484 (2d Cir 1977)

The [illegible] of statutes by Title 17 [illegible] are less [illegible] than those of [illegible] in the [illegible] other legislative [illegible] produced a brief and well [illegible] of 5) pages explaining not only that the alphabet changes are copyrightable but attributing the [illegible] of the [illegible] to [illegible]

on a number of grounds. For example plaintiff claims that the determination Copyright Office interpretation is invalid and that the application of the Office are also first right and impact upon [illegible]

[illegible] presents an alternative theoretical framework for the threshold question [illegible] are alphabet shapes copyrightable. We do so for a number of reasons.

(1) We believe that the case can and should be disposed of on this narrow ground so as to avoid unnecessary issues of constitutionality and other policy questions. This focus is consistent with the long-established principle that [constitutional] might not to pass on questions of constitutional [illegible] unless such adjudication is unavoidable. See Rescuestore [illegible] 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). Lyons v. Westinghouse [illegible] 222 U.S. 467, 469 (1912).

(2) We believe that the appropriate party to present views as to the authority of the Register is the Register herself.

(3) The issues of copyrightability [illegible] are of the authority of the Register. The recently passed copyright law provides an infringement system even without registration [illegible] as the procedural formalities are complied with and the Register is given notice. Pub. L. [illegible]

Mart Long [illegible]. Thus, unless the [illegible] question is mooted as suggested above, [illegible] or another equipment manufacturer who chooses to use a typeface [illegible], such as one of [illegible] members, a printer, publisher or even an [illegible] could do so under the new law without testing the authority of the Register.

ADI(c) will accordingly not address themselves to the subject matter dealing with administrative and constitutional issues. We will concentrate instead on the question of copyrightability.

2. Alphabet shapes are not "works of art" or other copyrightable "writings of an author" under the Copyright Statute

History makes a significant contribution to the answer to the question presented by this case set forth at page 4 above. As documented in detail in the Register's brief and history demonstrates that typeface designs have never been deemed copyrightable by Congress. Nor are they now. See

Because of the possibility of their liability under present law, representatives of the Authors League of America and several publishers [illegible] the [illegible] for protection of creative people in our society [illegible] generally [illegible] protection for [illegible] of the administrative hearing held before the Register.

A work is copyrightable only if it is the product of
original creation and expression. A work which lacks the element of
originality or creativity cannot be copyrighted. This conclusion
is clearly a conclusion of law as is the issue of originality in this
Court which must reach its own conclusions. Cf. Durham Ind.
North American, Inc. v. North Carolina National Bank, 505
F. 2d 831 (4th Cir. 1974).

We submit that by their nature alphabet shapes as a class of items do not fit the category of protectible works under copyright. This in no way lessens the efforts of Mr. Lapf or Mr. Parker or minimizes the expenditures of plaintiff. It simply means they are irrelevant. The efforts or expenditures of a Christian Dior for dresses, a Charles Eames for furniture and a Frank Lloyd Wright for a residence are all impressive but do not convert these items into works of art. There are many other products which while attractive are not considered "art" for the purpose of the copyright statutes. There is Pachmayr v. Lawrence to quote Judge Hatchett, [illegible] 133 F. Supp. 832 (S.D.N.Y. 1955), modified on other grounds, 240 F. 2d 817 (2d Cir. 1957), cert. denied, Pachmayr held that a wheat watch did not fall within the [illegible]
group of "works of art"

with particular even useful articles [illegible] are used as
mailing [illegible] objects of art [illegible] Nor was the shape of a
drum considered to be within the ordinary and customary
concept of art In Mazer & Stoddard v Kiddie Toys 347 U S
(1954) the court upheld the Register s re
fusal to register as a work of art the shape of a stat
uette as a cardboard frame for a photograph-phonograph re
cord combination

The shape of a letter should be treated no dif
ferently than the shape of a star Moreover the precedents
are particularly applicable to the present case because of
the nature and function of typeface designs The pertinent
Copyright Office regulations 37 C F R §202 10(c) cor-
rectly cover this situation by excluding registration for
designs of articles whose sole intrinsic function is their
utility The design elements of alphabet shapes are inex
tricably connected to the function of fonts grids and other
devices in producing effective type The shapes have no
other purpose but to be embodied on devices intended to be
operated in connection with machines Cf Brown Instrument
Co v Warner 161 F 2d 910 (D C Cir) cert denied 332
U S 816 (1947) (Rectangular box containing circular recording chart de
nied

The [illegible] functions of typefaces is that
[illegible] the power of typefaces to make their beauty

people simply use effective type as a vehicle with which to read. This inapplicable to the present situation is the questionable conclusion of Judge Cowell in Esquire v. Ringer 414 F Supp 318 (D D C 1976) appeal pending D C Cir '76 that a lighting fixture is a 'work of art' because it performs no function during the daytime. Thus plaintiff's argument attempting to minimize the relationship between type face design and legibility falls of its own weight.

The function of typeface designs particularly calls for denial of protection since shapes of alphabets are the raw material of words and language. The public policy against encumbering our alphabet with claims of private property is supported by cases in many different contexts emphasizing the need for keeping the public domain truly public. See, e.g. Baker v. Selden, 101 U.S. 99 (1879). Cf. Rosemont Enterprises Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966). Time Inc. v. Bernard Geis Inc., 293 F. Supp. 130 (S.D.N.Y. 1968). As stated in Mazer v. Stein, 347 U.S. 201, 217 (1954): "We cannot recognize copyright as a game of chess in which the public can be checkmated."

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* This conclusion is no more valid than the argument rejected in Vacheron, supra, that plaintiff's watch must be art because it is difficult to tell time from it.

Under these principles courts have been alert to prevent appropriation of the basic ingredients of the public vocabulary For example in Berlin v E C Publications, Inc 329 F 2d 541 (2d Cir 1964) the court expressed a doubt that "even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter" Cf Alberto-Culver Co v Andrea Dumon, Inc 466 F 2d 705 (7th Cir 1972) Smith v Muehlebach Brewing Co 140 F Supp 729 (S D Mo 1956) Forstmann Woolen Co v J W Mays, Inc 89 F Supp 964 (E D N Y 1950) To paraphrase even so eminent a designer as Herman Zapf should not be permitted to claim a property interest in the letter "A"

Plaintiff seeks to avoid the thrust of the foregoing reasoning and authority by arguing that Mr Zapf's ingenuity transforms the alphabet into a work of art The product is before the Court in Exhibits "A" and "B" to the Parker affidavit (A 34-35) We respectfully submit that this case can begin and end upon a visual examination of this alphabet by the Court

Plaintiff itself concedes the difficulty of discerning the differences between one typeface and another For example in the elaborate booklet printed by plaintiff for submission to the Copyright Office (Exhibit "C" to the Parker affidavit) it is stated at pages 40-41 that "to the untrained eye, Times and Plantin [two typefaces] may appear identical"

We thus are faced with a class of work with respect to which the untrained eye or ordinary observer neither perceives nor, we submit, cares about difference. This characteristic of typeface designs in and of itself should mean that copyright is inappropriate. It does mean, among other things, that a court would in all cases be unable to apply the recognized standard of determining similarities and differences for purposes of infringement articulated in Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) as follows: "[T]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard their aesthetic appeal as the same. That is enough."

The courts have increasingly emphasized the necessity of applying this "ordinary observer" test to the question of copyrightability as well as to the question of infringement. See, e.g., Vogue Ring Creations, Inc. v. Hardman, 410 F. Supp. 609 (D.R.I. 1976). In L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976), the Court of Appeals for the Second Circuit, in an en banc reversal of an earlier decision of a three judge panel, rejected copyrightability in a bank in the shape of Uncle Sam. The Court found differences between that bank and a public domain version which "are not perceptible to the casual observer." [emphasis added].

It is not enough for plaintiff to argue that experts might dissect its alphabet shapes and find them different from others Indeed, the District Court's observations that Eltra's design is "substantially different" from earlier designs (Findings, A 51) is of no significance, being based on the technical "conceptual principle known as Super Ellipse -- that is, a squared-off circle." (Id) Copyright cases make many key distinctions between experts and laymen See, e.g , Funkhouser v Loews, Inc., 208 F.2d 185, 188 (8th Cir 1953), cert. denied, 348 U.S 843 (1954). In Gardenia Flowers, Inc v Joseph Marcovitz, Inc., 280 F Supp. 776 (S.D N.Y 1968), the court noted, in rejecting copyrightability for an artificial flower, that "even a botanist's inspection which might reveal an unusual vein pattern in some of the leaves or abnormal stem configuration would be irrelevant "

The ordinary observer standard in no way injects aesthetics into this situation In Bleistein v Donaldson Lith Co. 188 U S 239 (1901), the Supreme Court was emphasizing the popular appeal of a circus poster, just as Judge Clark in Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955), disclaimed a judicial right to overrule public appreciation of a chimpanzee television character These cases merely show that where the public perceives and cares, a work should be considered art, irrespective of aesthetic judgments. We sub-

mit that no ordinary observer would purchase a book because it is set in ORION type

It is true that Section 5 of the copyright statute states that the classes of works such as "works of art" are not exhaustive. But plaintiff has failed to cite any instances in which protection was granted to a work not falling within these classes. And it has been noted in Nimmer on Copyright. §12 21, pp. 47-48, as follows

> "The implicit (and sometimes explicit) assumption of the courts and of the Copyright Office is that only such works as are enumerated in Section 5 are eligible for copyright. No reported decision indicates a validation of copyright except where the work in question fits into one of the Section 5 categories ..."

Nor does any other statutory language aid Eltra Goldstein v California, 412 U.S 546 (1973) stands for the proposition that the term "writings of an author" in Section 4 of the copyright statute is not co-extensive with the term "writings" of "authors" in the Constitution As stated by Chief Justice Burger "Since §4 employs the constitutional term 'writings,' it may be argued that Congress intended to exercise its authority over all works to which the constitutional provision might apply However, in the more than 60

years which have elapsed since enactment of this provision neither the Copyright Office, the courts nor Congress has so interpreted it." 412 U.S. at 567 [emphasis added]

3 The Authorities Cited in Eltra's Brief Do Not Support Reversal

Brief comment may be made on several matters raised in the first point of Eltra's brief (pp 6-18)

1. Professor Nimmer's "assertion" referred to on page 9, n. 6 of Eltra's brief, was "submitted on behalf of the Mergenthaler Linotype Company", i.e., plaintiff herein, in connection with the "typeface hearing" held by the Register

2 The history of the 1909 Act, as finally implemented by Mazer v. Stein, 347 U.S. 201 (1954), referred to on pages 8 and 9 of Eltra's brief, merely demonstrates that a work may be protected even if it is not a work of fine art This does not mean that everything that is not fine art is protected

3. Webster's definition of "art" as "the application of knowledge or skill in effecting a desired result" quoted on page 7 of Eltra's brief clearly shows that the word "art" in the copyright statute cannot be taken in its broadest sense

CONCLUSION

The design in question relates basically to the shape of an alphabet It is embodied on a device used in conjunction with typesetting machines to produce type The economic setting of the pertinent industry involved is unusual The Register of Copyrights held an unprecedented full-scale administrative hearing. Extensive testimony and written submissions failed to convince the Register to abandon the long standing practice of her office to deny registration to typeface designs as expressly embodied in regulations, 37 C.F.R. §202.1(a), and produced the present petitions action. Simultaneously, the Copyright Law has been completely revised and Congress has in the words of the House Judiciary Committee, "considered, but chosen to defer, the possibility of protecting the design of typeface" House Report, p. 55 (1976)* Against this background, it is submitted that

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* A question has even been raised as to whether typeface should be included in a sharply limited form of protection which the House Judiciary Committee has suggested for the 95th Congress. House Report at 30 This form of protection, which could incorporate compulsory license and other protective provisions unavailable to a court, could be supported by various segments of the industry, plaintiff's quest for judicial recognition of broad and unqualified protection cannot That only a legislative solution can provide the delicate mechanism required to balance all economic interests has been repeatedly made clear in copyright cases See, e.g., Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401, 408 (1968); Williams & Wilkins Co. v. U.S., 487 F.2d 1345, 1360, 1385, aff'd by an equally divided Court, 420 U.S. 376 (1975)

this Court should affirm the dismissal of this action which seeks copyright protection for the shape of an alphabet.

Respectfully submitted,

[illegible]

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[redacted]

[redacted]

(1) [redacted];

(2) [redacted];

(3) [redacted];

(4) [redacted];

(5) [redacted];

(6) [redacted]; and

(7) [redacted].

(b) In no case does copyright protection for an original work of [redacted] extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.